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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 73-1084

WENDELL P. RYNERSON, - - - Petitioner

versus

THE UNITED STATES - - - - Respondent

On Petition For Writs of Certiorari to the
United States Court of Claims

PETITIONER'S REPLY BRIEF

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v.

THE UNITED STATES, - - - - *Respondent*

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The United States Memorandum in Opposition to certiorari contains 3 points.

Point 1 states that the claim was for termination of petitioner's Army reserve commission. Point 3 states (correctly) that his claim for money rested not only on that ground, but first on the ground

> "that his 1945 discharge operated only to remove him from active duty and did not remove him from reserve status . . ."

as a commissioned reserve officer.

Respondent then states that ". . . other than reiterate his original contention petitioner has made no

attempt to support his position." On the contrary, the petition for certiorari at pages 38-42 argues:

> "B. The 1971 Decision of the Lower Court Improperly Denied an Evidentiary Hearing on the Merits of One Ground of Action."

namely, that the 1945 discharge operated only to remove him from active duty and did not remove him from reserve status. When the lower court declined to permit an evidentiary hearing on this point, all that the petitioner could do was reiterate his contention and argue as he did at pages 38-42, that the denial of any evidentiary hearing on the point was improper. The petitioner's STATEMENT OF THE CASE also relates to this point, in paragraphs numbered 5, 6, 11, 13-16, 19 and 25.

Opposition Point 2 quotes from *Kirby* v. *US,* 201 Ct. Cl. 527. That opinion and accompanying dissents are set out in Pet. App. 15-34. The petition of Rynerson for certiorari discusses or mentions Kirby or his case on pages 2, 10-13, 15-19, 22, 25, 28-34, 36-38 and 40-42. This was adequate criticism of and distinction from the Kirby case as to which a petition for certiorari (73-1257) is also pending.

Page 4 of the opposition memorandum says that petitioner was aware at least as early as 1957 that his discharge operated to deprive him of retirement benefits and mentions that he made two unsuccessful (administrative) attempts to have his discharge set aside. On the contrary, petitioner was only aware that the discharge *might* operate to deprive him of retire-

ment benefits. His efforts to avoid such a future construction of the effect of the discharge should not be held against him. He should be commended for trying to avoid litigation in court.

The opposition memorandum fails to discuss important public policies such as the rule against splitting causes of action. See page 32 of the petition for certiorari. *Kirby* v. *US* manages to sound plausible because it also fails to discuss such principles. The Court of Claims in *Kirby* cavalierly disregarded the extra work it would impose on other courts of the federal system.

The Court of Claims in 1971 said that Rynerson had timely presented a claim (for wrongful discharge; Pet. App. 9). In 1972, a Commissioner of that court tried the issue of the wrongfulness of the discharge (Pet., Statement of the Case, ¶ 16, page 8). The lower court itself did not decide that issue, nor set aside the 1971 ruling. Its 1973 dismissal of Rynerson's claim on the ground of the statute of limitations under these circumstances was a denial of due process.

The time of accrual of a claim, under the statute of limitations, must be considered. The lower court ignored the rule that a claim for money against the government does not mature until the claim is presented to the executive branch of the government. *Taylor's Administrator* v. *US* (1878), 14 Ct. Cl. 339, 353, affirmed in *U. S.* v. *Taylor* (Oct. 1881), 104 U. S. (14 Otto) 216, 26 L. ed. 721. That could not and did not happen here until 1965; suit was filed within 6 years from then.

For the foregoing reasons, it is respectfully submitted that the petition for writs of certiorari should be granted.

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